LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

ADDITIONAL APPENDIX TO PETITION FOR CERTIORARI

WESLEY R. ASINOF
Attorney for Petitioner
3424 First National Bank Bldg.
Atlanta, Georgia 30303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,

Petitioner

vs.

THE STATE OF GEORGIA,

Respondent

ADDITIONAL APPENDIX TO PETITION FOR CERTIORARI

This Appendix of Record is being separately presented under and by virtue of the authority provided for by Rule 23 (f) of the Rules of the Supreme Court of the United States.

The portions of the Record relied upon as will show the manner of raising the federal questions both in the court of first instance and in the appellate court, are

herein included in this separately presented Appendix to petition for certiorari.

GROUND #3 OF MOTION FOR REHEARING (R. 784)

3.

This Court Has Placed An Unconstitutional Interpretation On Admissibility Of Hearsay Declaration Of Conspirator, By Not Permitting Defendant To Be Confronted With Witness Against Him.

The court, on p. 13 and 14, division 2 (b) of its opinion, held:

> "In view of such evidence as to conspiracy it follows that it was not error to permit Seay to testify as to the declarations made to him by Pinion that 'the old man won't go up anymore' and that 'the old man was worried'; or as to Worley's statement to him that 'the old man' would harm him or his his family if he did not participate."

The court, in so holding and deciding, overlooked the decision of the Supreme Court of the United States in the case of *Bruton v. U.S.*, No. 705, 36 L.W. 44-47, Oct. Term 1967, Decided May 20, 1968, holding as follows:

> "We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

The *Bruton* case, *supra,* was decided by the Supreme Court of the United States about a week after the oral

argument before this Court in this case, and concerned the admissibility of an extrajudicial confession of a co-defendant implicating the defendant on trial. The objection to hearsay and prejudicial admission into evidence was held by the Supreme Court to be of a more serious nature in that such hearsay declaration deprived the defendant of the right to be confronted with the witness against him and also deprived him of the constitutional right to cross-examine the truthfulness and veracity of such declaration. The Court went on to say:

> "Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during their deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true – not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

In footnote number three to the same opinion, the Supreme Court stated:

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence."

This Court, in holding and deciding that hearsay declarations by Pinion and Worley were admissible against Park, has overlooked the following provision of the Constitution of the United States:

> "In all criminal prosecutions, the accused shall

> enjoy the right * * * to be confronted with the witnesses against him." (Amendment 6, United States Constitution.)

This holding of the Court also overlooks the fact that the appellant, by having such hearsay declarations admitted against him as evidence, has been denied the right to cross-examine the declarants, Pinion and Worley, as to whether or not such declarations were *true* or *false,* or *mere opinions* of such declarants, and thus the holding of this Court in division 3 (a) of the opinion that there was evidence of Park's participation in a conspiracy to murder Hoard, denied to the appellant due process of law as provided by the Fourteenth Amendment to the United States Constitution.

This Court has in effect allowed such declarations to be considered as testimony of Pinion and Worley just as much as if they had testified to such facts from the witness stand. Thus the hearsay declarations are in evidence without having even afforded the defendant the right to be confronted by such witnesses or to cross-examine them as to its truthfulness or veracity.

Because of these facts the declarations of Pinion and Worley were hearsay and inadmissible and this Court erred in holding them to be admissible.

(R. 734, 738)

A. C. (CLIFF) PARK vs. THE STATE	CASE NUMBER 24588 SUPREME COURT OF GEORGIA

ENUMERATION OF ERRORS

1. The trial court erred in failing and refusing to direct a verdict of not guilty and in overruling appellant's motion for directed verdict on the ground the evidence failed to prove a prima facie case of conspiracy to murder against the appellant and failed to prove the appellant to have been a party to a conspiracy to murder Floyd Hoard. (T. 585-590)

2. The trial court erred in failing and refusing to direct a verdict of not guilty and in overruling appellant's motion for directed verdict on the ground that the testimony of Lloyd Seay, a witness for the State and alleged accomplice, was not corroborated by other evidence connecting the appellant with the offense of murder and the case should not have been submitted to the jury. (T. 585-590)

3. The trial court erred in permitting State witness Lloyd Seay, over objection by the appellant, to testify to the contents of a conversation with Douglas Pinion made out of the presence of the appellant that the witness told Pinion that the man who wanted to do the killing wanted $7,500.00 instead of $5,000.00 and Pinion replied that he would go see but he didn't think that the man would pay more than about 45, so the witness stayed an hour and Pinion came back and said "the old

man" wouldn't go up any, but "I will put $500.00 on it and make it $5,500.00." (T. 577-578) This testimony was inadmissible because it was a hearsay declaration of an alleged conspirator made out of the presence of the defendant on trial without the State having proved a prima facie case of conspiracy against the appellant to murder the person alleged in the indictment to have been murdered. (T. 496 & 577 & 578 - 463 to 481 - 483 to 487)

4. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation with George Worley made out of the presence of the appellant. The testimony objected to and admitted was as follows:

> "Yes sir. As I stated, I can't remember the exact words, but he told me if I didn't go along with them that the old man would just get somebody else to do it, and I would be the only one that knew about it — that they knew about it — and after that he was killed by somebody else, if he were picked up he would be afraid I would talk or implicate him some way, and he would have something done to me or parts of my family, and that that could happen." (T. 579-580-497)

5. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation with Douglas Pinion, made out of the presence of the appellant. The testimony objected to and admitted was as follows:

> "Yes sir. He did. He said the old man was worried. That he kept asking him who done it, and Doug said he never did tell him. Said he told him one time somebody from Mississippi might have done it, and next time he told him a man from Detroit." (T. 511, 580, 581, 582 and 583)

6. The trial court erred in permitting State witness Ronald Angel to testify, over objection by appellant, to the contents of a conversation with Douglas Pinion on September 5, 1967, out of the presence of the appellant at which time the following testimony was given by the witness and admitted by the court:

> "I asked Mr. Pinion in response to this investigation if he would give me a statement as to his whereabouts the night of August 6th, the Sunday night. Mr. Pinion advised me that he was at his mother's residence; that he was there with his girl friend, Eugenia Smith. up until approximately 10:00 to 10:30 at night. He said that upon his girl friend leaving, he left the residence and went to Barrow County, Winder, Georgia and did not return home until approximately 1:30 A.M. in the morning." (T. 552, 553, 583, 584, 585)

7. The trial court erred in permitting State witness Cleghorn to testify, over objection by appellant, to the contents of a conversation with Mr. Angel relating to Angel's being out at "Mr. Cliff's where they have a big truck backed up where they can load it," made out of the presence of the appellant. (T. 573, 574)

8. The trial court erred, in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation between the witness, the Sheriff and the Solicitor out of the presence of A. C. Park, relative to waiting until the next morning to make the raid on the appellant's house. (P. 574-575)

9. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Trooper Rawlings going to the yellow house. (P. 575-576)

10. The trial court erred in permitting State witness Vernon Kidd, over objection of appellant, to testify to the contents of a conversation had with Sheriff Perry in the early part of 1966 about the sale of beer. (T. 576, 577)

11. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that Douglas Pinion told him that he was working with Mr. Parks. (T. 462 to 481)

12. The trial court erred in permitting State witness Ronald Angel, over objection by appellant, to testify that if Funderburk had sold him liquor eight times it was really on behalf of Mr. Park. (T. 576)

13. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that he knew when he was dealing with Doug Pinion in June that he was dealing with him as the agent of Mr. Park. (T. 485, 486)

14. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that he knew who George Worley was talking about when he was talking about "the old man." (T. 499, 500)

15. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that George Worley told him that "the old man" would have something done to him or parts of his family in order to scare the witness into going along with him. (T. 500, 501)

16. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation had between the witness and

Pinion in the presence of A. C. Park, without requiring proof as to whether Pinion or Park made such statements. (T. 482, 483)

17. The trial court erred in permitting State witness Cleghorn to testify, over objection by appellant, to the contents of a conversation with the deceased, Floyd Hoard, during the last part of March or first part of April, 1967, relating to the deceased's distrust of the Sheriff and the Revenue Agents, (T. 568) and other hearsay events, (T. 569, 570,) all out of the presence of the appellant.

18. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Floyd Hoard, deceased, on the Thursday prior to the raid. (P. 570-571)

19. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Floyd Hoard, deceased, that a Sheriff and Solicitor ought to get along and that the fine you get off a man like that is not a drop in the bucket. The merchandise you take away from him is where you tear him up. That means everything to me. (P. 571-572-573)

/s/ WESLEY R. ASINOF

WESLEY R. ASINOF
Attorney for Appellant
3424 First National Bank Bldg.
Atlanta, Georgia 30303

MOTIONS TO EXCLUDE HEARSAY EVIDENCE (R. 660, 676)

MR. ASINOF. I might say that the motion we have will be a motion to exclude certain portions of the testimony. I want to apologize at this time to the Court, that while it may seem a little cumbersome, but I think it is necessary to point them out in defense of my client in order to comply with the rulings of the appellate court.

THE COURT. All right, sir.

MR. ASINOF. I move the Court to exclude a certain portion of the testimony of Lt. Cleghorn, a witness for the State, as appears in his testimony, and the specific testimony that I move to exclude is Lt. Cleghorn's testimony that the Solicitor talked to him in Winder about the last of March or the first of April about the Pendergrass deal, and he said something had to be done, and that he didn't trust the Sheriff; he didn't trust the Revenue Agents, and asked the witness if he would help him and stay with him, and the witness replied that he would; and the further testimony by the witness that the Solicitor had told him that the only man that could make him not do it would be the witness' voice. The witness didn't believe he could, and the Solicitor further stated that he would contact the witness later.

MR. ASINOF. His further testimony along that line that just a few days prior to that the Solicitor called him at his home one night, and asked him if he would go, and if Slick Culverson lived at Gainesville, and the witness told the Solicitor he did. The Solicitor further asked him if he would go to Slick Culverson's with him.

MR. ASINOF. (continuing) The further testimony

of the same witness immediately following that that he told the Solicitor that he would, and the Solicitor asked if he would, and that the witness testified that the Solicitor then said — "Will you carry me?" To which the witness replied, "Yes, sir." When the Solicitor again was quoted as saying, "What time?" The witness said, "You name it." Further testimony by the witness immediately thereafter that the Solicitor said, "8 o'clock," and the witness replied, "Yes, sir; I will be leaving at 8:00 o'clock."

MR. ASINOF. (continuing) The further testimony by the witness of the conversations, he called Fred to be sure Fred would be at home, and that he then asked Fred for an undercover man from the Revenue Department, and that Fred told him that he would get him one just as soon as he could; that he had his best man to cover one in Americus — to cover a man in Americus and that his wife was expecting a baby. That he didn't know if she had the baby or not, but he would get him someone as quick as he could. The witness further testified that Fred asked him if he would help him on the Pendergrass deal, and that Mr. Hoard said that he wanted to get enough on Pendergrass to padlock him.

MR. ASINOF. (continuing) The further testimony of the witness that he told the Solicitor that he would help him.

MR. ASINOF. (continuing) Now we move to exclude all of that evidence on the ground that the witness was testifying to a hearsay conversation between himself and the deceased, Floyd Hoard, some several months before Mr. Hoard's death, the conversation being hearsay, not subject to cross examination by the person mak-

ing it, a denial of the defendant's Constitutional right to be confronted with the witnesses against him, to-wit: Mr. Floyd Hoard, and not illustrating any issue in this case, and having been failed to have been connected up by the defendant as being relevant or material to the issues in this case, and also being highly prejudicial, and our motion is to exclude that evidence at this time and instruct the jury to disregard it.

MR. HAMES. Once the State has prima facie proved the existence of a conspiracy, the acts, conduct of the conspirators and the entire force of the conspiracy itself, it is proper to trace it back to its beginning.

MR. HAMES. (continuing) We submit that in tracing it back that a conspiracy that the State has established the acts and conduct that brought about the investigation and subsequent arrest which eventually provided the motive for the defendant to kill Floyd Hoard is admissible for that purpose.

THE COURT. All right, sir. The Court will so rule and overrule the motion to exclude.

MR. ASINOF. All right, sir. We now move the Court to exclude a certain portion of the testimony of Lt. Cleghorn, a witness for the State, wherein he testified as to a conversation held with the Solicitor on Thursday prior to the raid, to the effect that the witness testified that the Solicitor had asked him where Angel was, and the witness replied that "he was out somewhere," and the Solicitor then said, "Would you call him in?" And the witness then a few minutes later testified that he had a further conversation then and there with the Solicitor, Mr. Floyd Hoard, in which Mr. Hoard said to him, "Let's ride up the road," and he further stated to the witness, "Let's go in my pickup."

MR. ASINOF. (continuing) We are moving to exclude that portion of Lt. Cleghorn's testimony on the ground that it consisted of a hearsay conversation with Mr. Floyd Hoard sometime prior to his death. There is not evidence that the defendant was present. It is not admissible as in any way as a statement of declaration, confession or admission by the defendant, or by any person charged in this case as a conspirator by the State or a defendant in this case — the defendant in the crime for which the indictment is drawn and on the ground that this testimony now appearing to have been made out of the presence of the defendant is highly prejudicial, inflammatory, irrelevant, immaterial, and highly prejudicial to him and we move to exclude it.

THE COURT. All right; Mr. Hames?

MR. HAMES. The testimony which might under some circumstances might be hearsay changes its character and becomes original evidence in order to explain acts, conduct, and motive.

THE COURT. All right, sir. Motion to exclude is overruled.

MR. ASINOF. Now, if Your Honor please, we move to exclude a portion of the testimony of Lt. Cleghorn, a witness for the State, in which he testified to a conversation with the Solicitor, Mr. Floyd Hoard, in which he testified Mr. Hoard told him out of the presence of this defendant and any defendant named in this bill of indictment prior to Mr. Hoard's death that a Sheriff and a Solicitor ought to get along, and that Mr. Hoard thought that he ought to tell the Sheriff, to which the witness replied, "Solicitor, you are the one that's handling the raid. You are the Solicitor; if you want to tell

the Sheriff, you tell him." And when the witness told the Solicitor, "The fine you get off a man like that is not a drop in the bucket. The merchandise you take away from him is where you tear him up."

MR. ASINOF. (continuing) And the further testimony by the witness that the Solicitor stated to him, "That means everything to me. You all don't know what that does mean to me." And the witness replied, "Yes, sir. I know what it means to you."

MR. ASINOF. (continuing) Wherein the witness testified that the Solicitor stated to him, "You have told the Sheriff; you told him you wouldn't buy anything — wouldn't sell him nothing. That is exactly right." And at the same time the conversation in which the witness testified of a conversation had — that would suffice on that motion, Your Honor, except to state that we are moving to exclude it on the grounds that it is hearsay, and not made by any of the persons charged as being a conspirator, and made out of the presence of the defendant in the case and any of the other defendants, and therefore is irrelevant, immaterial, and highly prejudicial.

MR. HAMES. Your Honor, we are not now in the act of receiving evidence, but I am informed that some jurors have come into the courtroom.

THE COURT. Ladies and gentlemen, is there anyone in this courtroom that received a summons to appear today? If you are, stand up and hold up your hand. Last week, too. Only one? I'll ask you to leave the courtroom, and there's another one. All those who have received summons for this week or last to be here, please leave the courtroom and don't come back until 9:00 o'clock in the morning. And I'll instruct the Bailiff's to try to

inquire of those who try to come in as to whether or not they have received a summons for jury duty, and, if so, deny them admittance, please. Thank you.

MR. HAMES. To the objection that has been made in this instance, I will restate that the conversations and other matters that normally would be considered as hearsay become not hearsay, but original evidence and are admissible to explain acts and conduct and motive.

THE COURT. All right, sir. The Court will overrule the motion to exclude that testimony.

MR. ASINOF. All right, sir. Now, we move the Court to exclude from evidence the testimony of Lt. Cleghorn to the effect that he had a telephone conversation on Friday — a Friday night about 10:00 o'clock, with a Mr. Angel, to the effect that Mr. Angel stated to the witness that he had been out to Mr. Cliff's, and "they have got a big truck backed up there where they can load it," to which the witness replied, "Where are you calling from?" To which Angel stated, "Pay station on I-85." To which the witness replied, "You call me back in five minutes. I can't call you at the pay station."

MR. ASINOF. (continuing) And the witness testified that at that time he called the Solicitor, and that the Solicitor's wife answered the phone. That he told her he wanted to talk to the Solicitor, and she replied, "He's taking a shower," to which the witness replied, "I need to talk to him right quick." He testified that the Solicitor came to the phone, and the witness told him that he had received a call from Angel, and that they were loading that beer, to which the witness stated, "Meet me up there." The witness said, "I will be down there when you get there." The witness testified that he

told Angel — and Angel called him back — and the witness told him to watch this truck and see where it went.

MR. ASINOF. (continuing) Now, we move to exclude all of that testimony on the ground that it is a hearsay conversation had out of the presence of this defendant, and out of the presence of any of the defendants on trial in this case, and it is highly prejudicial, inadmissible, and made at a time that the defendant would not have had the opportunity to reply.

THE COURT. Anything —

MR. HAMES. We insist that it is admissible to explain acts, conduct, and motive, as it changes its character from hearsay to original evidence.

THE COURT. All right, sir. Motion to exclude that testimony is overruled.

MR. ASINOF. Your Honr please, we move the Court to exclude the evidence — that portion of the testimony of the witness of the State, Lt. Cleghorn, relating to a conversation between himself and the Sheriff and the Solicitor out of the presence of the defendant, A. C. Park, to the effect that the Solicitor stated, "I guess we will have to — " — and the Sheriff said, "I guess we will have to wait until the morning." "Everything is locked up — can't get nobody to the door." To which the witness replied, "I've got a key there in the trunk of that car that will unlock them beer doors with an axe."

MR. ASINOF. (continuing) Move to exclude that testimony on the grounds that it is hearsay and made by a party not a party in this case, and made out of the presence of the other defendants in this case.

THE COURT. All right, sir.

MR. HAMES. I am certain, Your Honor, this was offered for the purpose of proving acts, motive, and conduct, and its character changes from hearsay to original evidence.

THE COURT. This motion to exclude that evidence is also overruled.

MR. ASINOF. Your Honor please, we move to exclude from evidence that portion of the testimony of Lt. Cleghorn where he testified in response to Trooper Rawlings going to the yellow house where Rawlings asked him who lived up there, and the witness told him Albert Funderburk, and Rawlings then stated to the witness, "He is not up there. He's over yonder where that beer is." To which the witness replied, "Turn around then." On the ground that that testimony was hearsay, made out of the presence of the defendant, does not relate to any of the conspirators in this case alleged in the indictment of the defendant. Was not made in the presence of any of the defendants, and is therefore purely hearsay, and does not explain conduct, and is merely a narration of some conversation had out of the presence of the defendant, and is highly prejudicial.

MR. HAMES. That was offered as original evidence to explain acts, motives, and conduct.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. Your Honor please, we move the Court to exclude the portion of the testimony of Mr. Angel — Ronny Angel — a witness sworn on behalf of the State, to the effect that that witness testified in the affirmative to a question asked by the State as follows:

Question asked by the State was: "Then if he was doing that the eight times he was, you made purchases from him, was really on behalf of Mr. Park, wasn't it?" To which the witness replied, "Yes, it was."

MR. ASINOF. (continuing) We renew our motion to exclude that portion of the witness's testimony on the ground it was a conclusion on the part of the witness and inadmissible.

THE COURT. All right, sir.

MR. HAMES. It proves acts and conduct of those involved in the conspiracy, and the State having offered the evidence prima facie to establish the existence of the conspiracy.

THE COURT. This motion is also overruled — the motion to exclude overruled.

MR. ASINOF. We move to exclude that portion of the testimony of State's witness, Vernon Kidd, wherein he testified as follows: The witness was testifying as to a conversation had with Sheriff Perry outside of the presence of the defendant in this case, and the witness testified, "The conversation we had in part occurred, I believe, in the early part of '66 — one particular night in '66 — I don't know when it was — whether it was in February or March. He spoke to Smith and myself about the sale of some beer for two weeks of a person whose name I did not identify. He just said something about it."

MR. ASINOF. (continuing) Now, we move to exclude that testimony on the ground that it appears to have been a hearsay conversation had between the witness Kidd and the Sheriff out of the presence of this de-

fendant; it's not relating to anything to which the defendant would have had the opportunity to reply at that time, and is therefore hearsay and doesn't come within the exceptions to the hearsay rule and privileges.

MR. HAMES. The testimony of this witness was that Sheriff Perry came to him and asked him was he willing to make a deal for the sale of beer and, thereafter, this defendant came to him, and the testimony was also corroborated and supported by the testimony of the witness, Albert Funderburk, that he picked up seven to eight truckloads of beer from that place as a result of his conversation. It deals with a conspiracy during the course of the conspiracy of the acts, and conduct of this defendant, along with, through acts and conduct in concert with others.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. Move the Court to exclude that portion of the testimony of the witness, Lloyd Seay, witness for the State, and also a co-defendant in this case, wherein the witness was testifying of a conversation between the witness and another co-defendant, Douglas Pinion, to the effect that he had told Doug that the man that wanted to do it wanted $7,500 instead of $5,000, and he said that he would go see, and he didn't think that the man would pay any more than about 45, so the witness stayed an hour and Pinion came back and said "the old man" wouldn't go up any, but "I will put $500 on it and make it $5,500." We move to exclude that testimony on the ground that it was a hearsay statement made between the witness Seay and co-defendant Doug Pinion out of the presence of defendant Park, and that the State has at this time failed to connect that de-

fendant or this defendant Park with the conspiracy by a prima facie showing by evidence aliunde the statements of the alleged conspiracy, and therefore it would be hearsay and inadmissible and highly prejudicial, and we move to exclude it on those grounds.

THE COURT. Mr. Hames?

MR. HAMES. We insist the State has offered ample evidence that this defendant, A. C. (Cliff) Park, did along in action and concert with others cause, procure, aid and abet in the commission of the murder of Floyd Hoard. We submit that this is the testimony of one of the co-conspirators, the defendant on trial, made during the pendency of the conspiracy, and before a full disclosure and before the conspiracy had terminated. We insist it is admissible.

THE COURT. All right, sir. This motion to exclude is also overruled.

MR. ASINOF. Your Honor, we move to exclude that portion of the testimony of Lloyd Seay, a witness for the State, a co-defendant in this case, wherein the witness was testifying about a conversation he had had with one George Worley, in which Worley had led the witness to believe that if the witness didn't go through with it and didn't go along with it and help him that the "old man" would only get someone else to do it, and the witness would be the only one that knew about it other than them, on the ground that such statement, conversation, having been had out of the presence of the defendant, at a time when the State has failed to prove a prima facie showing that this defendant, A. C. (Cliff) Park was any part of such a conspiracy by evidence aliunde of the alleged conspirators; therefore, hearsay,

inadmissible, highly prejudicial, and should be stricken from the record, and we so move.

MR. HAMES. There was a statement made by one of the men charged in this bill of indictment along with the defendant on trial in the course of the conspiracy that the State has submitted ample evidence to prove made during the pendency of the conspiracy and before the same was terminated, and we submit that it is admissible.

THE COURT. This motion is also overruled.

MR. ASINOF. Your Honor please, during the trial of this case and in the testimony of the witness, Lloyd George Seay, a witness for the State, the following was testified to by him: Quote: "Yes, sir. As I stated, I can't remember the exact words, but he told me if I didn't go along with them that the old man would just get somebody else to do it, and I would be the only one that knew about it – that they knew about it – and after that he was killed by somebody else, if he were picked up he would be afraid I would talk or implicate him some way, and he would have something done to me or parts of my family, and that that could happen," close quotes – that portion of that testimony we now move to exclude on the ground that it related to a conversation had between the witness and one George Worley out of the presence of this defendant, and there has been no prima facie showing by the State of a conspiracy between the defendant Park and either one of the two parties to that conversation, and is therefore hearsay as to this defendant, not being present at the time it was made, and it's highly prejudicial to him, and inadmissible evidence and we so move to exclude that portion of the testimony.

MR. HAMES. There may be one or two words different from the previous motion, but I don't recognize them, and I present the same argument that it is admissible.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. During the testimony of Lloyd George Seay, a witness for the State and co-defendant in this case, the witness testified to the contents of a conversation that he had had with co-defendant Douglas Pinion, in which the witness testified in this language: "Yes, sir. He did. He said the old man was worried. That he kept asking him who done it, and Doug said he never did tell him. Said he might have messed up one time. Said he told him one time somebody from this city might have done it, and next time he told him a man from Detroit."

MR. ASINOF. (continuing) We move to exclude that portion of Mr. Seay's testimony on the ground that it now appears to have been a hearsay statement made by Pinion to Seay out of the presence of the defendant, A. C. (Cliff) Park, and the State has failed to prove a prima facie case of conspiracy linking A. C. (Cliff) Park to the conspiracy, and therefore as to him it's hearsay, binds only the persons who made it, and cannot be considered by the jury as evidence against this defendant, is highly prejudicial, and we move to exclude it on those grounds.

MR. HAMES. As counsel said that the testimony was to the effect that some man "in this city" did, and that's a misstatement of the record, and has not been testified to on the trial of this case.

MR. ASINOF. May it please Your Honor, if I may, I would like to ask that where I used the word "city" in quoting from the evidence, that I would like to substitute the word "county" – and strike the word "city." Apparently, it is a typographical error, and still urge the same objection. Excuse me; let me have a conference with counsel.

THE COURT. All right, sir.

MR. ASINOF. Your Honor please, if I may, let me strike that last statement – the word "city" – I would like to strike the word "city" – I would like to strike the word "county" from the record, in which I quoted the testimony of Mr. Seay, and substitute the word – name "Mississippi" – I think this was a typographical error on the part of the court reporter –

MR. HAMES. The word was "Mississippi."

MR. ASINOF. (continuing) "Mississippi" – that's what I had here, and apparently was a typographical error.

THE COURT. All right, sir.

MR. ASINOF. Let me rephrase the entire statement for the sake of clarity, and let me rephrase the part of the testimony we object to.

MR. HAMES. I don't think it's necessary, if the Court will consider the word "Mississippi" or name "Mississippi" and insert it in lieu of "this city." We all know what he is talking about.

MR. ASINOF. Well, it's not but three lines, Your Honor.

THE COURT. All right, sir. You may.

MR. ASINOF. (continuing) The testimony we are

objecting to is the testimony of Seay where he testified the following language, "Yes, sir; he did. He said the old man was worried; that he kept asking him who done it and Doug said he never did tell him. That he might have messed up one time; that he told him one time somebody from Mississippi had done it, and the next time he told him a man from Detroit" — close quotes — and that's the testimony that we object to on the grounds as previously stated.

THE COURT. All right, sir.

MR. HAMES. We submit that this was a statement made by one of the parties in the bill of indictment to a second party named in the bill of indictment concerning the defendant now on trial, his course of conduct. The State has fully established and from all of the evidence shows a conspiracy existed between those three and two additional people to kill Floyd Hoard. That it was made during the pendency of the conspiracy and prior to its termination, and therefore the acts and conduct of the co-conspirators are admissible as to this defendant now on trial.

THE COURT. This motion is also overruled.

MR. ASINOF. May it please the Court, we respectfully submit that during the trial of this case, the witness for the State, Mr. Ronny Angel, testified to a conversation had with Mr. Pinion, one of the co-defendants named in this bill of indictment, made after the death of Floyd Hoard, and out of the presence of this defendant, A. C. (Cliff) Park, in a motel room here in Jefferson in which the witness testified as follows: "I asked Mr. Pinion in response to this investigation if he would give me a statement as to his whereabouts the

night of August the 6th, the Sunday night. Mr. Pinion advised me that he was at his mother's residence; that he was there with his girl friend, Eugenia Smith, up until approximately 10:00 to 10:30 at night. He said that upon his girl friend leaving, he left the residence and went to Barrow County, Winder, Georgia, and did not return home until approximately 1:30 a.m. in the morning." Close quotations.

MR. ASINOF. (continuing) We move to exclude this portion of Mr. Angel's testimony on the ground that the same is hearsay. It is alleged declaration by an alleged conspirator made after the fact of the conspiracy had ended. It was not made in furtherance of the conspiracy. It was not made during its pendency. It is self-serving in itself, and it is therefore hearsay and made out of the presence of the defendant. It is highly prejudicial, irrelevant and immaterial, and that it is merely a narration of a past event concerning interviews with a person who has not testified as a witness in this case. It is not subject to being admitted under any rule of impeachment or under any rule of law, and is therefore hearsay and does not come within the exception of the hearsay rule, and so we move to rule that portion of the testimony out.

THE COURT. All right –

MR. HAMES. The State has submitted ample proof of the conspiracy existing between A. C. (Cliff) Park, the defendant on trial, Lloyd George Seay, George Iras Worley, J. H. Blackwell, and Douglas Pinion. This is a statement of Pinion that is offered by the State for the purpose of corroboration of the testimony of J. H. Blackwell, and the testimony of Lloyd Seay, in that they testi-

fied that when they arrived in the area they made their first foray to the premises of the late Solicitor, Floyd Hoard. That there was some confusion, and that Lloyd Seay left and went to a considerable distance and was gone for approximately forty-five minutes, and that Lloyd Seay testified that he made this foray to the home of Douglas Pinion. That Douglas Pinion was not at home at the time he arrived, and so it is offered for the purpose of corroboration of the testimony of Blackwell and Seay; is made in the furtherance of the conspiracy itself in all of its entire sequence, names and identities of the conspirators. It is made during the pendency of the conspiracy and is admissible and bonding, as a statement of a co-conspirator and declaration made by him upon this defendant here on trial.

CONCLUSION TO SEPARATE APPENDIX

The foregoing appendix consists of such pertinent quotations of specific portions of the record, with specific reference to the places in the record where the matter appears, as is contained on page 5 of the petition for certiorari under the heading of "Manner of Raising Federal Question."

WESLEY R. ASINOF
Attorney for Petitioner in Certiorari
3424 First National Bank Bldg.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, Wesley R. Asinof, a member of the Bar of the Supreme Court of the United States and Counsel for Petitioner in Certiorari in the above styled case do hereby certify that I have this day served copies of the foregoing Appendix To Petition for Certiorari upon counsel of record for the State of Georgia by depositing in the United States Mail Depository, with sufficient postage for first class prepaid mail one copy each to G. Wesley Channell, Solicitor General, Jackson County Courthouse, Jefferson, Georgia and to Hon. Arthur Bolton, Attorney General, care of State Judicial Building, Atlanta, Georgia, counsel for the State of Georgia.

This.....day of October, 1968.

WESLEY R. ASINOF